

**BURSOR & FISHER, P.A.**

L. Timothy Fisher (SBN 191626)  
Yeremey O. Krivoshey (SBN 295032)  
Blair E. Reed (SBN 316791)  
1990 North California Blvd., Suite 940  
Walnut Creek, CA 94596  
Telephone: (925) 300-4455  
Facsimile: (925) 407-2700  
E-Mail: ltfisher@bursor.com  
breed@bursor.com  
ykrivoshey@bursor.com

**BURSOR & FISHER, P.A.**

Scott A. Bursor (SBN 276006)  
2665 S. Bayshore Dr., Suite 220  
Miami, FL 33133  
Telephone: (305) 330-5512  
Facsimile: (305) 676-9006  
E-Mail: scott@bursor.com

*Class Counsel*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IGNACIO PEREZ, on Behalf of Himself  
and all Others Similarly Situated,

Plaintiff,

v.

RASH CURTIS & ASSOCIATES,

Defendant.

Case No. 4:16-cv-03396-YGR

**PLAINTIFF'S NOTICE OF MOTION  
AND MOTION FOR THE COURT TO  
APPROVE THE PROPOSED NOTICE  
TO CLASS MEMBERS OF PENDENCY  
OF PLAINTIFF'S MOTION FOR AN  
AWARD OF ATTORNEY'S FEES,  
COSTS AND EXPENSES, AND SERVICE  
AWARD FOR THE CLASS  
REPRESENTATIVE**

Date: November 12, 2019

Time: 2:00 p.m.

Courtroom: 1

Judge: Hon. Yvonne Gonzalez Rogers

**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE THAT** on November 12, 2019 at 2:00 p.m. or as soon thereafter as counsel may be heard by the above-captioned Court, located at 1301 Clay Street, Oakland, CA 94612, Courtroom 1, 4th Floor in the Courtroom of Judge Yvonne Gonzalez Rogers, Plaintiff Ignacio Perez (“Plaintiff” or “Class Representative”), by and through his undersigned counsel of record, will move and hereby does move, pursuant to Fed. R. Civ. P. 23(h)(1) and the Court’s September 9, 2019 Final Judgment Order, ECF No. 370, for an order approving the Proposed Notice to Class Members of Pendency of Plaintiff’s Motion for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class Representative.

This motion is made on the grounds that Fed. R. Civ. P. 23(h)(1) requires that notice of Plaintiff’s Motion for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class Representative be directed to class members “in a reasonable manner.” *See* ECF No. 370 at 2 (“Notice of the motion shall be directed to Class Members pursuant to Fed. R. Civ. P. 23(h)(1).”).

This motion is based on: (1) this Notice of Motion and Motion, (2) the Memorandum of Points and Authorities in support thereof, (3) the Declarations of Scott A. Bursor (“Bursor Decl.”) and Victoria Fellner (“KCC Decl.”) filed herewith, (4) the papers and pleadings on file, and (5) the arguments of counsel at the hearing on the Motion.

**CIVIL RULE 7-4(a)(3) STATEMENT OF ISSUE TO BE DECIDED**

Whether the Court should approve Plaintiff’s Proposed Notice to Class Members.

Dated: October 7, 2019

**BURSOR & FISHER, P.A.**

By: /s/ Scott A. Bursor

Scott A. Bursor (SBN 276006)  
2665 S. Bayshore Dr., Suite 220  
Miami, FL 33133  
Telephone: (305) 330-5512  
Facsimile: (305) 676-9006  
E-Mail: scott@bursor.com

**BURSOR & FISHER, P.A.**

L. Timothy Fisher (SBN 191626)  
Yeremey O. Krivoshey (SBN 295032)  
Blair E. Reed (SBN 316791)  
1990 North California Blvd., Suite 940  
Walnut Creek, CA 94596  
Telephone: (925) 300-4455  
Facsimile: (925) 407-2700  
E-Mail: [ltfisher@bursor.com](mailto:ltfisher@bursor.com)  
[ykrivoshey@bursor.com](mailto:ykrivoshey@bursor.com)  
[breed@bursor.com](mailto:breed@bursor.com)

*Class Counsel*

1 On September 23, 2019, Ignacio Perez (“Plaintiff” or “Class Representative”) filed his  
2 Motion for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class  
3 Representative. ECF No. 371. Pursuant to Fed. R. Civ. P. 23(h)(1) and the Court’s September 9,  
4 2019 Final Judgment Order, ECF No. 370, Plaintiff hereby submits a proposed notice plan to notify  
5 class members regarding his motion for fees, costs and expenses, and service award.

6 **I. THE PRIOR NOTICE TO CLASS MEMBERS**

7 On November 12, 2018, Plaintiff filed a motion seeking for the Court to approve a notice  
8 plan pursuant to Fed. R. Civ. P. 23(c)(2)(B) whereby Kurtzman Carson Consultants (“KCC”)  
9 would 1) send a copy of a Long Form notice to all class members for whom email addresses had  
10 been identified, 2) send a copy of a Post Card notice to all class members for whom email  
11 addresses are not available or whose emails came back undeliverable, but postal addresses are  
12 available, and 3) cause a copy of the class notice to be posted on a dedicated website  
13 (www.rashcurtislawsuit.com) with links to important case documents. Plaintiff’s Proposed Notice  
14 of Pendency of Class Action, ECF No. 249. On March 5, 2019, Plaintiff filed a Request that the  
15 Court Approve the Pending Notice Plan and Motion to Shorten Duration of Class Notice Period.  
16 ECF No. 293. Defendant filed an opposition on March 8, 2019. ECF No. 294. The Court  
17 approved Plaintiff’s proposed notice plan on April 4, 2019. Pretrial Order No. 2 re: *Daubert*  
18 Motions, Select Motions *in Limine*, and Proposed Jury Instructions & Questionnaire, ECF No. 315,  
19 at 2 n. 4.

20 In April 2019, KCC implemented the notice plan in full, sending out the Long Form notice  
21 to class members for whom email addresses were available, sending out the Post Card notice to  
22 class members without email addresses and for whom postal addresses were available, and by  
23 establishing a notice website containing the contents of the Long Form notice and important case  
24 documents. KCC Decl. ¶¶ 2-4. No class members opted out. *Id.* ¶ 4.

25 The Long Form notice instructed class members that Class Counsel may ask the Court for  
26 an award of fees to be awarded out of any money obtained for the Class and that Class Counsel  
27 would ask for expenses to be paid by Defendant:  
28

1                   **15. How will the lawyers be paid?**

2                   If Class Counsel get money or benefits for the Class, they may ask the  
3                   Court for fees and expenses. You will not have to pay these fees and  
4                   expenses. If the Court grants Class Counsel's request, the fees and  
                    expenses would be either deducted from any money obtained for the Class  
                    or paid separately by Defendant.

5                   *See* ECF No. 249, Ex. A (Long Form Notice), at 5, ¶ 15. No class members objected to Class  
6                   Counsel's ability to seek attorney's fees out of "money obtained for the Class," and no class  
7                   members opted out of the class.

8                   The prior notice also included and referenced the website, rashcurtislawsuit.com, where  
9                   class members could find more information about the case, and would have available important  
10                  documents from the case, such as the complaint, the answer, and the Court's orders on class  
11                  certification and summary judgment. This website has been maintained continuously since notice  
12                  was disseminated in April 2019.

13                  **II. CLASS MEMBERS SHOULD BE NOTIFIED THROUGH THE SAME**  
14                  **WEBSITE USED FOR THE INITIAL NOTICE**

15                  Unlike Fed. R. Civ. P. 23(c)(2)(B), which requires "the best notice that is practicable under  
16                  the circumstances, including individual notice to all members who can be identified through  
17                  reasonable effort," Fed. R. Civ. P. 23(h)(1), which regulates the award of attorney's fees and costs  
18                  in class actions, requires only that notice be "directed to class members in a reasonable manner."  
19                  Here, as discussed above, Plaintiff has already caused direct notice to be provided to class  
20                  members pursuant to Fed. R. Civ. P. 23(c)(2)(B). Both the Long Form and Post Card notices  
21                  directed class members to visit the dedicated website – www.rashcurtislawsuit.com – for case  
22                  updates and for more information. *See* ECF No. 249, Exs. A, B. The Long Form notice and the  
23                  dedicated case website notified class members that Class Counsel would seek attorney's fees out of  
24                  the class members' recovery at trial. *See* ECF No. 249, Ex. A (Long Form Notice), at 5, ¶ 15.

25                  Since class members have already been directed to the case website, it is reasonable to  
26                  apprise class members of Plaintiff's fee motion through 1) updating the case website with  
27                  information about the result of the trial, 2) posting Plaintiff's fee motion and updated case-relevant  
28                  documents on the website, and 3) giving class members 60 days to file objections, if any. A copy

of the updated content for the website is attached as Exhibit 1 to the Bursor Declaration, filed herewith.

On September 24, 2019, one day after Class Counsel filed the motion for attorney's fees, costs and expenses, and service award, Class Counsel directed KCC to immediately upload the following documents to the "Case Documents" page on the website:

- Plaintiff's Motion for an Award of Attorney's Fees, Costs and Expenses, and Service Award for the Class Representative, ECF No. 371;
- Declaration of Scott A. Bursor in Support of Plaintiff's Motion for an Award of Attorney's Fees, Costs and Expenses, and Service Award for the Class Representative, ECF No. 371-1;
- Declaration of Ignacio Perez in Support of Plaintiff's Motion for an Award of Attorney's Fees, Costs and Expenses, and Service Award for the Class Representative, ECF No. 371-2;
- Final Judgment, ECF No. 370;
- Class Action Verdict Form, ECF No. 347.

KCC uploaded the documents that same day. KCC Decl. ¶ 6.

### **III. PROPOSED SCHEDULE**

Plaintiff's Motion for an Award of Attorney's Fees, Costs and Expenses, and Service Award for the Class Representative is set for hearing on January 14, 2020. ECF No. 371. Class Counsel proposes that the deadline for any opposition to that motion should be 60 days after KCC posts the updated content for the website, which is attached as Exhibit 1 to the Bursor Declaration. KCC will be able to effectuate such notice within seven days of an order from this Court approving the proposed notice plan. As discussed above, KCC has already posted Plaintiff's fee motion, the Bursor and Perez declarations in support of the motion, the Final Judgment, and Class Action Verdict Form on the website.

### **IV. IN THE ALTERNATIVE, PLAINTIFF PROPOSES DIRECT NOTICE WITH DEFENDANT TO BEAR COSTS**

The Ninth Circuit has recognized the "general principle that interim litigation costs, including class notice costs, may be shifted to defendant after plaintiff's showing of some success on the merits, whether by preliminary injunction, partial summary judgment, or other procedure."

1 *Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1143 (9th Cir. 2009). *See also id.* (noting that  
 2 “many district courts have placed notice costs on the class action defendant once the defendant’s  
 3 liability has been established”); *Sullivan v. Kelly Servs., Inc.*, 2011 WL 31534, at \*1 (N.D. Cal. Jan.  
 4 5, 2011) (“Defendant shall bear the costs of notice”). Thus, in *Hunt*, the Ninth Circuit held that it  
 5 was appropriate “to require a class action defendant to pay the costs of class notification when the  
 6 court has already determined that the defendant is liable on the merits.” *Id.*, 560 F.3d at 1139.  
 7 Further, shifting costs of class notice is appropriate “in the attorney fee context,” and even though  
 8 the relevant “time period for an appeal on liability has [not] expired.” *See id.* Here, Plaintiff and  
 9 the Class have prevailed on their claims after a jury trial on the merits. Thus, should the Court  
 10 determine that direct notice is required, the Court should order Defendant to pay the costs of any  
 11 notice ordered by the Court within 14 days of the Court’s order. KCC, the previously appointed  
 12 notice administrator, estimates that the cost of repeating another direct notice will be approximately  
 13 \$19,022. KCC Decl. ¶ 5.

14 If the Court determines that another direct notice is required, Plaintiff proposes the same  
 15 method of disseminating the notice as the method previously approved by the Court on April 4,  
 16 2019. *See* ECF No. 315, at 2 n. 4. As before, Plaintiff proposes that KCC send an Email Notice to  
 17 all class members for who email addresses had been identified, 2) send a copy of a Post Card  
 18 Notice to all class members for whom email addresses are not available or whose emails come  
 19 back undeliverable, but postal addresses are available, and 3) cause a copy of the Long Form  
 20 Notice to be posted on a dedicated website ([www.rashcurtislawsuit.com](http://www.rashcurtislawsuit.com)) with links to important  
 21 case documents.<sup>1</sup> Copies of the proposed Email Notice and Post Card Notice are attached as  
 22 Exhibits 2 and 3 to the Declaration of Scott A. Bursor. The Email and Post Card notices update  
 23 class members as to the trial victory and judgment. Bursor Decl. Exs. 2, 3. They also inform class

24  
 25 <sup>1</sup> As discussed above, on September 24, 2019, KCC already posted a copy of (1) Plaintiff’s Motion  
 26 for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class  
 27 Representative, ECF No. 371, (2) the Declaration of Scott A. Bursor in Support of Plaintiff’s  
 28 Motion for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class  
 Representative, ECF No. 371-1, (3) the Declaration of Ignacio Perez in Support of Plaintiff’s  
 Motion for an Award of Attorney’s Fees, Costs and Expenses, and Service Award for the Class  
 Representative, ECF No. 371-2, (4) the Final Judgment, ECF No. 370, and (5) Class Action  
 Verdict Form, ECF No. 347.

members that Class Counsel is seeking attorney's fees, costs and expenses to be drawn from the judgment, and that Plaintiff Perez is seeking a service award to be drawn from the judgment (and the respective amounts of each). *See id.* The notices also inform class members that they have the right to object to Class Counsel's requests for fees and expenses and Plaintiff Perez's service award, and direct class members how to make timely and proper objections. *See id.*

## V. SCHEDULING

Should the Court rule that direct notice is required, Plaintiff proposes that the deadline for class members to object to Plaintiff's Motion for an Award of Attorney's Fees, Costs and Expenses, and Service Award for the Class Representative shall be 60 days after the dissemination of notice. Plaintiff and KCC will be able to effectuate direct notice within 14 days of an order from this Court approving the proposed notice plan.

## VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order as soon as practicable directing notice to the class in accordance with the notice plans described herein.

Dated: October 7, 2019

**BURSOR & FISHER, P.A.**

By: /s/ Scott A. Bursor

Scott A. Bursor (SBN 276006)  
2665 S. Bayshore Dr., Suite 220  
Miami, FL 33133  
Telephone: (305) 330-5512  
Facsimile: (305) 676-9006  
E-Mail: scott@bursor.com

**BURSOR & FISHER, P.A.**

L. Timothy Fisher (SBN 191626)  
Yeremey O. Krivoshey (SBN 295032)  
Blair E. Reed (SBN 316791)  
1990 North California Blvd., Suite 940  
Walnut Creek, CA 94596  
Telephone: (925) 300-4455  
Facsimile: (925) 407-2700  
E-Mail: ltfisher@bursor.com  
ykrivoshey@bursor.com  
breed@bursor.com

*Class Counsel*